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Supreme Court, U.S.
FILED

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No.

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In the Supreme Court of the United States

STATE OF LOUISIANA,
DEPARTMENT OF NATURAL RESOURCES

Petitioner

VERSUS

ALBERT J. AVENAL, JR., CLARENCE R. DUPLESSIS, KENNETH A. FOX, FOX OYSTER COMPANY, AND NICK L. SKANSI

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA
and
LOUISIANA COURT OF APPEAL FOR THE
FOURTH CIRCUIT

APPENDIX VOLUME I
Appendix A - Appendix H

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APPENDIX A

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

ON APPLICATION FOR WRIT OF CERTIORARI
DIRECTED TO PLAQUEMINES
25TH JUDICIAL DISTRICT COURT
NO. 38-266, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

* * * * * *

JAMES F. MC KAY, III
JUDGE

* * * * * *

(Court composed of Chief Judge Robert J. Klees, Judge Miriam G. Waltzer, Judge James F. McKay, III, Judge Philip C. Ciaccio, Judge James C. Gulotta)

ON APPLICATION FOR REHEARING

CIACCIO, J., CONCURS WITH ADDITIONAL REASONS

WALTZER, J., DISSENTS

GULOTTA, J., RESPECTFULLY DISSENTS FOR THE REASONS ASSIGNED BY JUDGE MIRIAM WALTZER

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WRIT DENIED, JUDGEMENT AFFIRMED

In this class action, the defendant seeks review of the trial court's refusal to grant summary judgment. On rehearing, we deny the writ and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

The impetus for the present litigation was the construction of the freshwater diversion structure located on the east bank of the Mississippi River at Caernarvon in Plaquemines Parish. As far back as the 1950's and 1960's, the federal and state governments were working on plans to divert freshwater from the Mississippi River into adjacent marshlands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity levels. The increased salinity levels were due to both man-made and natural causes. In 1965, Congress authorized the building of certain freshwater diversion structures in and around the Breton Sound Basin. In 1968, the U.S. Army Corps of Engineers first proposed Caernarvon as a sight for a freshwater diversion control structure.

Due to changes in the level of salinity, the zone favorable for oyster growth continued to move toward land during the 1970's. This change in salinity had the effect of rendering unusable large areas of previously productive oyster grounds. Between 1978 and 1982, the Corps held informal discussions with state and local agencies concerning the construction of a freshwater diversion structure located at Caernarvon. In September of 1984, the Corps issued a report that proposed that one large freshwater diversion structure be constructed at Caernarvon. Congress authorized funds for

the construction of the Caernarvon project in October of 1986.

Although the State of Louisiana expressed its intent to participate in the project as early as 1982, the state did not enter into a formal agreement with the Corps until June of 1987. The agreement provided that the State was to be responsible for twenty-five percent (25%) of the total costs of construction, and would maintain and operate the facilities following construction. Construction on the project commenced in June of 1988 and was completed in February of 1991. The Caernarvon project was modeled after smaller state and local diversion structures constructed in the 1950's and 1960's, which had proved effective in restoring oyster production previously destroyed by excessive salinity levels. However, the plaintiffs in the present suit allege that the freshwater diverted from the Mississippi River by the Caernarvon project dilutes the salinity of the water where their oyster leases are located, thereby increasing the growth of vegetation and bacteria on or near the water bottoms and causing silt to deposit there, thereby rendering plaintiffs' leases incapable of oyster growth and cultivation.

On March 29, 1994, the plaintiffs, certain oyster leaseholders/fishermen, filed the present class action on behalf of all persons holding oyster leases on state water bottoms in Breton Sound. The plaintiffs alleged that a taking without just compensation had occurred. The plaintiffs further alleged that this taking violated the Fifth Amendment of the United States Constitution and Article 1, § 4 of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the

Caernarvon freshwater diversion structure.

On April 26, 1994, virtually all of the representative plaintiffs in the present suit as well as some additional plaintiffs filed suit in the United States Court of Federal Claims against the U.S. Army Corps of Engineers, which designed, financed, and built the Caernarvon freshwater diversion structure. In that suit, the plaintiffs alleged a taking under the Fifth Amendment to the United States Constitution and sought class certification.

The defendants in the federal suit moved for summary judgment which the Court of Claims granted in August of 1995.[1] The decision was affirmed by the Federal Circuit Court of Appeals in November of 1996.[2] Following the decision of the Court of Appeals, the defendants in the present state court action filed a motion for summary judgment, arguing that collateral estoppel bars the re-litigation of issues already decided by the federal courts. The trial court denied the motion on January 5, 1998. The defendants sought review of that ruling from this Court. On March 3, 1999, the majority of a five-judge panel granted the defendant's writ and reversed the trial court's denial of summary judgment. The plaintiffs applied for rehearing which was granted by the same five-judge panel on March 26, 1999. In connection with the rehearing, this Court ordered that the entire record be forwarded to this Court and allowed additional briefing and set oral argument before this Court.

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[1] 33 Fed. Cl. 778 (1995)

[2] 100 F.3d 933 (Fed. Cir. 1996)

STANDARD OF REVIEW

In this case we must determine whether the trial court's denial of the defendant's motion for summary judgment was proper. Appellate courts must review summary judgments *de novo*. Act No. 483 of 1987 amended La. C.C.P. art.966 effective August 15, 1997, and it is to be applied retroactively as well as prospectively. Perry Waller v. American Seafoods Co., 97-0302, p.1 (La. App. 4 Cir. 10/1/97), 700 So.2d 1306, 1307, writ not considered, 97-2769 (La. 1/30/98), 709 So.2d 693. In the aforementioned case, the Court went on to explain:

> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La.C.C.P. art. 966 A (2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966 B. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. La.C.C.P. 966 C (2).

Id.

DISCUSSION

The question central to our analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law and if so whether the plaintiffs' action is barred by collateral estoppel. If the standard is the same or if the definition of a taking is broader under federal law, summary judgment should have been granted in the instant case. However, if the standard is different and the definition of a taking is broader under Louisiana law, the trial court's refusal to grant summary judgment was proper.

Louisiana law, which clearly pertains to the state law claims in this case, does not recognize the doctrine of collateral estoppel. Steptoe v. Lallie Kemp Hospital, 634 So.2d 331, 335 (La. 1994); Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978). In Welch, the Supreme Court rejected all forms of the doctrine, stating: "Collateral estoppel is a doctine of issue preclusion alien to Louisiana law. Developed in the common law, the device precluded the relitigation of issues actually decided in a prior suit between the parties on a different cause of action. Id. at 156. Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms.

Although the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking under the Louisiana Constitution is different. Article 1, § 4 of the Louisiana Constitution in

pertinent part provides: "Property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit."

There is a jurisprudentially recognized action for inverse condemnation arising out of "the self-execution nature of the constitutional command to pay just compensation." State through DOTD v. Chambers Investment Company, Inc., 595 So.2d 598, 602 (La. 1992). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property but just compensation has not been paid... Id.

In the instant case, the plaintiffs' oyster leases are a recognized property right under the laws of this state. The defendant's freshwater diversion project has allegedly caused damage to this right. The plaintiffs further claim that the defendant has not justly compensated them for their loss. Because the defendants have not paid any compensation to the plaintiffs, this case may amount to inverse condemnation.

Louisiana employs a three-pronged analysis to determine whether a claimant is entitled to eminent domain compensation. Id. at 603.

> Under this analysis, we must first determine if a person's legal right with respect to a thing or object has been affected. In other words, we must be able to identify a recognized species of property right that has been affected, regardless of whether causes of action may exist on the theories; otherwise, it cannot

> be said there has been an exercise of the power of eminent domain. Second, if it is determined that property is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under La. Const. Article I § 4.

Id. at 603.

A lessee's business losses, if proven to have been caused by the State's taking or damaging of property, are compensable under the "full extent of his loss" measure of recovery. State through Dept. of Highways v. Constant, 369 So.2d 699 (La. 1979). The lease of state-owned water bottoms for, among other purposes, oyster cultivation, is provided for by law. See La. R.S. 41:1255 and La. R.S. 56:421 et seq. The federal Court of Appeals has already found that the plaintiffs/oyster lessees have a protected property interest in their leases. It is not disputed that this property right has been adversely affected by state action. It is also clear that the creation of the Caenarvon freshwater diversion structure was for a public purpose.

Because this is the case, our analysis must now turn to the question of whether different standards should be applied in cases where inverse condemnation rather than formal expropriation of property has taken place. There is no basis in Louisiana law for the different treatment of property owners in these two situations. The same substan-

tive constitutional right (the right, secured by Art. 1, § 4 of the 1974 Louisiana Constitution, to receive full compensation for the governmental taking of private property) is triggered by both. The only bar (complete or partial) to compensation in either of these situations is bad faith. State, Dept. of Transp. and Development v. Vermillion Development Co., 249 So.2d 167, 258 La. 1159 (La. 1971); Parish of East Baton Rouge v. Landrum, 289 So.2d 215 (La.App. I CIR. 1973); Holland v. State, Dept. of Transp. and Development, 554 So.2d 727 (La.App. 2 Cir. 1989); State, Dept. of Transp. and Development v. Morein, 628 So.2d 1191 (La.App. 3 Cir. 1993); Packard's Western Store v. State, Dept. of Transp. and Development, 618 So.2d 1166 (La.App. 2 Cir. 1993). The "distinct investment-backed expectations" of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is irrelevant to the question of whether a taking has occurred under Louisiana law. There is nothing in the record of the instant case to indicate that the plaintiffs were in bad faith.

CONCLUSION

For the foregoing reasons we find that the trial court was correct in denying the defendant's motion for summary judgment. Accordingly, this writ is denied and the judgment of the trial court is affirmed. This case is remanded to the district court for further proceedings.

WRIT DENIED, JUDGMENT AFFIRMED

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * * * *

CIACCIO, J., - CONCURS WITH ADDITIONAL REASONS,

I voted to grant a rehearing because my review of our earlier opinion disclosed errors of law that had lead to an erroneous judgment.

State through Department of Transportation Development v. Chambers Inv. Co, 595 So.2d 598, 604 (La. 1992), was an inverse condemnation proceeding. It held that the action for inverse condemnation is a procedural remedy for an owner to seek compensation for an uncompensated taking or damaging against a governmental entity where no expropriation has commenced. Further, the action for inverse condenmation is available in all cases where there has been a taking or damaging of property where just compensation has not been paid, without regard to whether the property is corporeal or incorporeal. The Court made no distinction regarding the scope of compensation or the burden of proof applicable to claims arising out of inverse condemnation or formal expropriation. Accordingly, our earlier

opinion erred in finding a distinction between the two causes of action insofar as it would diminish the compensation payable to an inverse condemnation claimant.

Since the cause of action for an inverse condemnation claim arises out of the same self-executory nature of the constitutional demand to pay just compensation, State, through Department of Transportation and Development v. Chambers Inv. Co., supra at 598, the same rules of law and evidence apply to both types of proceedings.

In the case of State, Department of Transportation and Development v. Vermillion Development Co., 249 So.2d 167,258 La. 1159 (La. 1971), our Supreme Court enunciated the principle that knowledge of an anticipated expropriation does not bar a claim for compensation by a lessee of the property in the absence of proof of bad faith, fraudulent or predatory conduct. This rule of law has been uniformly followed in the cases cited in the majority opinion together with the case of Board of Commissioners v. Missouri Pacific Railroad, 625 So.2d 1070, 1076-78, (La. App. 4 Cir. 1993), writs denied, 630 So.2d 802-3 (La. 1994).

The crux of the dismissal of plaintiff's suit in the Federal Court was the finding that plaintiffs knowledge of the pending action. of the Corps of Engineers and the State of Louisiana prevented them from having a "reasonable investment backed expectation that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal government." But prior knowledge of an anticipated expropriation is not a bar to compensation under Louisiana law. Aside from the proce-

dural difficulty of applying collateral estoppel, the rule of law relied upon by the Federal court is contrary to the more liberal rule of law followed by our state courts.

No Louisiana case has denied compensation under the theory of the lack of a "justifiable investment backed reliance interest." In the case of Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission, 97-1367 (La. 5/19/98); 715 So.2d 387, 393, the plaintiffs commercial fishermen claimed to have a justifiable investment backed reliance interest in their right to fish. The Court did not decide the case on this basis but held that the plaintiffs did not possess a vested incorporeal right to fish so that there was no taking of any property right-corporeal or incorporeal-possessed by plaintiffs. Knowledge of an impending expropriation or regulatory action was not an issue.

Accordingly, I find no rule of law that requires us to use the Federal court decision to dismiss plaintiffs' suit on the basis of collateral estoppel. Plaintiffs' bad faith, if alleged, is a matter of proof that is clearly in dispute at this stage of the proceedings at the trial level. Accordingly, the granting of summary judgment was not appropriate.

The trial judge was correct in denying the motion for summary judgment.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * *

WALTZER, J. dissents.

On rehearing, the majority concluded that "Since there has been no prior suit between the leaseholders and the Department of Natural Resources, even if collateral estoppel existed in Louisiana law, it is inapplicable by its own terms." They reasoned that "Although the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking under the Louisiana Constitution is different." Moreover, the majority opined that "The 'distinct investment-backed expectations' of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), is irrelevant to the question of whether a taking has occurred under Louisiana law." From this opinion, I must dissent.

Concurring in the majority opinion, Judge Ciaccio posits that plaintiffs' "*prior knowledge* of an anticipated expropriation is not a bar to compensation under Louisiana law." Relying on *State of Louisiana, through the Department of Highways v. Vermilion Development Co.*, 249 So.2d 167,

and *Board of Commissioners v. Missouri Pacific Railroad Co.*, 625 So.2d 1070, the concurring opinion concludes that "the rule of law relied upon by the Federal court is contrary to the more liberal rule of law followed by our state courts." This opinion determined that the majority opinion on original hearing erred by "finding a distinction between the two causes of action [inverse condemnation and expropriation] insofar as it would diminish the compensation payable to an inverse condemnation claimant."

In deciding the preclusive effect of a federal judgment, we are bound by Louisiana law (and arguably the United States Constitution) to apply federal law. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). Collateral estoppel, or issue preclusion, is a concept firmly entrenched in federal law. *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir. 1995). Although the leaseholders did not sue the State of Louisiana in the prior federal suit, such an identity of parties is not required to apply the doctrine of collateral estoppel, issue preclusion. *Blonder-Tongue Laboratories, Inc., v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1970).

We granted rehearing in this matter to consider whether the issue actually litigated in the prior federal action is identical to an issue at stake in this subsequent state action. In the federal action, the court found that no compensable taking occurred, since the plaintiffs had taken advantage of favorable conditions created by prior projects, knew or should have known of the expected freshwater diversion project and its potential to adversely affect their

oyster leases, and could not have had a legitimate investment-backed expectation that conditions would remain favorable for oyster cultivation. Essentially, the federal court found that no constitutional taking had occurred, because the leaseholders did not have a legitimate investment-backed expectation. In determining what is a taking under the Louisiana Constitution, are the factors enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), relevant? I can find no authority for a conclusion that these factors are irrelevant. Moreover, numerous Louisiana cases have relied on federal authority for analyzing what is a constitutional "taking." *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission,* 97-1367 (La. 5/19/98); 715 So.2d 387, 392-93, *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87), *reversed for different reasons* 515 So.2d 1087 (La. 1987), *Annison v. Hoover*, 517 So.2d 420, 423 (La.App. 1 Cir. 12/22/87); *writ denied by* 519 So.2d 148 (La. 2/12/88), *Layne v. City of Mandeville,* 93-0046 (La.App. 1 Cir. 12/29/93); 633 So.2d 608, 6 10, *writ denied by* 94-0268 (La. 3/25/94); 635 So.2d 234, *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La.App. I Cir. 9/23/97); 700 So.2d 975, 984.

Both the majority and the concurring opinions concluded that Louisiana law does not distinguish between causes of action for inverse condemnation and expropriation, relying on *State through Department of Transportation and Development v. Chambers*, 91-1202 (La. 3/2/92); 595 So.2d 598. With this conclusion, I respectfully disagree. Louisiana law distinguishes between causes of action for inverse condemnation and expropriation. In *Chambers*, the

Louisiana Supreme Court recognized this distinction and stated "The action for inverse condemnation provides a procedural remedy to a property owner seeking compensation for land already taken or damaged against a governmental or private entity having the powers of eminent domain where no expropriation has commenced." *supra*, at 602. The cases relied upon by the majority and concurring opinions involve expropriations and do not involve the issue central to this litigation, whether the state subjected the leaseholders' property to a constitutional taking. Moreover, expropriation proceedings, unlike inverse condemnation actions, are governed by LSA-R.S. 19:1, *et seq.*

Furthermore, the majority and concurring opinions rely upon *State through Department of Transportation and Development v. Vermillion Development Co.*, 249 So.2d 167 (La. 1971), for the principle that knowledge of an expropriation does not bar a claim for compensation, in the absence of bad faith. We are not confronted with the issue of appropriate compensation in this appeal. In this inverse condemnation action, we are asked to consider whether the leaseholders' property has been subjected to a constitutional taking. Whether knowledge of an expropriation bars compensation was not the issue addressed by the federal court in this litigation. Unless and until a constitutional taking is established, the issue of compensation should not be addressed. *Chambers, supra at* 603.

For the above reasons, I dissent from the opinion on rehearing.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * * *

GULOTTA, J., RESPECTFULLY DISSENTS FOR THE REASONS ASSIGNED BY JUDGE MIRIAM WALTZER.

APPENDIX B

25TH JUDICIAL DISTRICT COURT FOR THE PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 38-266

DIVISION "B"

ALBERT J. AVENAL, JR.,et al

VERSUS

STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RE.SOURCES

FILED: January 5, 1999 JULIE V. COLE
DEPUTYCLERK

JUDGMENT

The Motion for Summary Judgment Under the Doctrine of Collateral Estoppel filed on behalf of Defendant, The State of Louisiana through the Department of Natural Resources, came before the Court for hearing on January 5, 1999.

Having considered the arguments of counsel, and based upon the pleadings filed on behalf of both Plaintiffs and Defendant, and for the reasons set forth at the hearing which are incorporated herein by this reference, the Defendants Motion for Summary Judgment Under the

Doctrine of Collateral Estoppel is DENIED and the request for stay is DENIED.

POINTE A LA HACHE, LOUISIANA this 5th day of January, 1999.

/s/ illegible
JUDGE

A TRUE COPY
/s/ illegible
Dy. Clerk of Court,
Parish of Plaquemines, La.

DO NOT CHARGE FOR SERVICE

(STATE AGENCY - R.S. 13:4521)

TWENTY FIFTH JUDICAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

NUMBER: 38-266 DIVISION "B"

ALBERT J. AVENAL, JR., ET AL

versus

.THE STATE OF LOUISIANA,
and THE DEPARTMENT OF NATURAL RESOURCES

FILED: FEB - 1, 1999 /s/ illegible
DEPUTY CLERK

REASONS FOR JUDGMENT

The Court heard argument on various motions for summary judgment and motions in limine in regards to this captioned litigation on the 5th day of January, 1999. Several were taken under advisement by the Court.

For instance, the Defendants filed a motion for summary judgement in regards to the taking issue pled in the original petition and which is basically what this suit is about. The Court has denied that motion.

The Defendants seek to have this litigation dismissed arguing in that motion for summary judgment principally that the Plaintiffs could not have had a "reasonable expectation" that their leases would not be disturbed by freshwater

diversion projects. Because there is no constitutional guarantee of unimpeded revenue from oyster production, they argue, there is no claim as raised in this suit.

Additionally, the Defendants urge that this Court is bound by federal decisions to the effect that these claims are barred. Those federal decisions themselves bar these claims, they urge. Their arguments are in effect suggesting that these Plaintiffs have no cause or right of action and these proceedings should be dismissed.

The Court specifically rejects the notion that the Court of Claims proceeding on the federal level in anyway impedes the Plaintiffs' right to pursue this litigation. There is no need for Louisiana Courts to bring Louisiana law on this issue "in line with" federal decisions.

The State's motion also fails to preclude the Plaintiffs' right to recover as pled in this suit. While arguing the lack of any legal rights rather then attempting to foreclose factual issues which might show there is no claim herein, they have failed to establish either. The Plaintiffs have pled theories of recovery allowable under the law.

The Court was also presented with a motion in limine regarding the State's effort to introduce evidence of "hold harmless" provisions of the leases under which these claims arise. The Plaintiffs suggest that the enforceability either factually or legally of such a provision is an issue to be decided by the Court after trial, should there be a judg-

ment in their favor.

The Defendants have filed a motion for partial summary judgment on the issue of indemnity, again, an issue arising as a result of the contractual relationship between the Plaintiffs and the State. The Court believes that both these issues are not jury questions and must be decided by the Court, if applicable, after the jury findings.

Thus, the Court will not allow the State to argue to the jury that the Plaintiffs do not have a claim in this matter because of a hold harmless provision in the lease. There are no factual issues in that regard, rather, the State would have the jury decide a legal issue. Likewise, the issue of indemnity is one which the jury will not hear or be allowed to consider. It will be dealt with by the Court. That motion for summary judgment is deferred to a later time.

Finally, the Plaintiffs seek to preclude evidence that they are in "bad faith" in regards to their claims in that they acquired leases in anticipation of the freshwater diversion project and seek to be rewarded from this public works project rather then for being deprived of valid property rights. This motion is granted as well.

The Court does not consider it relevant for what reason a putative class member may have acquired an oyster lease. If such a lease was acquired and oysters produced and harvested, he may have a valid claim in this matter. If not, he may not have lost anything from, this alleged inverse condemnation. It serves no purpose to allow evidence of ill-

motive or bad faith.

The Plaintiffs are instructed to prepare a judgment in accordance with the Court's rulings herein.

Pointe-a-la-Hache, Louisiana, this 1st day of February, 1999.

/s/ illegible
JUDGE

A TRUE COPY

Dy. Clerk of Court,
Parish of
Plaquemines, La.

APPENDIX C

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

ON APPLICATION FOR WRIT OF CERTIORARI
DIRECTED TO
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 38-266, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

* * * * * *

MIRIAM G. WALTZER
JUDGE

* * * * * *

(Court composed of Chief Judge Robert J. Klees, Judge Miriam G. Waltzer, Judge James F. McKay III, Judge Pro Tempore Philip C. Ciaccio and Judge Pro Tempore James C. Gulotta)

KLEES, C. J., CONCURS AND DISSENTS FOR, THE REASONS ASSIGNED BY JUDGE MCKAY.

MCKAY, J, CONCURS IN PART AND DISSENTS IN PART.

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WRIT GRANTED, JUDGMENT REVERSED

The state, defendant, seeks review of the denial of summary judgment. The state argues that a federal judgment, dismissing all claims by these same plaintiffs against the United States' government, precludes re-litigation of the same issues against the state in this second action.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, oyster leaseholders/fishermen, filed the present class action on 29 March 1994 on behalf of all persons holding oyster leases on state water bottoms in Breton Sound. Plaintiffs alleged that a taking had occurred without just compensation in violation of the Fifth Amendment to the U.S. Constitution and Article 1, § 4 of the Louisiana Constitution because their oyster leases were adversely affected by the freshwater outflow from the Caernarvon freshwater diversion structure, located on the east bank of the Mississippi River in Plaquemines Parish.

On 26 April 1994, Avenal and virtually all of the same representative plaintiffs in the present state suit, with some new ones, filed suit in the U.S. Court of Federal Claims against the United States and its agencies, including but not limited to the U.S. Army Corps of Engineers, which designed, financed and built the Caernarvon freshwater diversion structure. In that suit, the plaintiffs alleged a taking under the Fifth Amendment to the U.S. Constitution, one of the two claims raised in the present suit, and sought a class certification.

Defendant in the federal suit moved for summary judgment on several grounds. The Court of Claims granted

summary judgment in August 1995.[1] On appeal to the Court of Appeals for the Fifth Circuit, that decision was affirmed in November 1996 .[2]

Following the Avenal Fifth Circuit decision, defendant in the present state suit filed a motion for summary judgment arguing that collateral estoppel barred the re-litigation of the issues decided by federal judgment. The trial court denied the motion for summary judgment on 5 January 1998, "for the reasons set forth at the hearing" held that same date. (No transcript of the hearing is attached to defendant's writ application.)

Both the Court of Claims and the Fifth Circuit decisions are rich in facts. The undisputed facts, as taken from those decisions, show that federal and state government action was being planned as far back as the 1950's and 1960's to divert freshwater from the Mississippi River into adjacent marsh lands to improve oyster habitats and to reduce the mortality rate associated with increased salinity levels. According to a 1959 memorandum by the U.S. Fish and Wildlife Service to the U.S. Army Corps of Engineers, this action would benefit existing oyster-rich marshlands which had, over time, become too saline as a result of man-made and natural causes. Based on that memorandum, in 1965 Congress authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin, which lies east of the Mississippi River and south of New Orleans. In 1968, the Corps proposed Caernarvon as a situs for a freshwater diversion control structure .

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1 *Avenal v. United States*, 33 Fed. Cl. 778 (1995).

2 *Avenal v. United States*, 100 F. 3d 933 (5th Cir. 1996).

During the 1970's, the zone favorable for oyster growth continued to move landward, due to salinity changes, spawning an oyster community in marshlands which had previously been too fresh to sustain such growth. However, this inland movement of salinity had the deleterious effect of rendering unusable large areas of previously productive oyster grounds. The evidence showed that the representative plaintiffs in the federal suit, with few exceptions, the same representative plaintiffs in the present state action, had acquired their leases for oyster farming at the earliest, in 1976. These leases covered those areas which had previously been unsuitable for oyster growth.

Between 1978 and 1982 the Corps and relevant state and local agencies continued to discuss at informal meetings the construction of a freshwater diversion structure at Caernarvon. The Corps issued a final report in September 1984, proposing that one large freshwater diversion structure be constructed at Caernarvon. In October 1986, Congress authorized funds for the construction of the Caernarvon project.

Although the State of Louisiana expressed its intent to participate in the Caernarvon project as early as January 1982, the State did not enter into a formal agreement with the Corps until June 1987. The agreement provided that the State was to be responsible for 25 percent of the total costs of construction, and would maintain and operate the facilities following construction. Construction of the Caernarvon freshwater diversion project commenced in June 1988 and was completed in February 1991. The Caernarvon project was modeled after smaller state and local diversion struc-

tures constructed in the 1950's and 1960's, which had proved effective in restoring oyster production previously destroyed by excessive salinity levels.

Plaintiffs in both the federal suit and the present suit claim that the freshwater diverted from the Mississippi River by the Caernarvon project dilutes the salinity of the waters where their oyster leases are located, increases the growth of vegetation and bacteria on or near the water bottoms there, and causes silt to deposit there, rendering plaintiffs' leases incapable of oyster growth and cultivation.

In their motion for summary judgment filed in federal court, the United States alleged several grounds, including that the plaintiffs had no compensable expectancy in continued saltwater intrusion or a particular salinity level, and that the plaintiffs had no reasonable investment-backed expectations to continuation of the saltwater intrusion or a particular salinity level which was caused by earlier diversion of freshwater from its historic flows.

The Court of Claims ruled that the plaintiffs lacked a compensable property interest in the salinity of the water for purposes of the Fifth Amendment's taking clause and dismissed the suit. The Fifth Circuit affirmed that judgment on other grounds. The federal appellate court found that the plaintiffs did have a property interest, created by the state, which was protected by the Fifth Amendment, and that the federal and state project had altered the salinity conditions to the detriment of oyster cultivation. However, the court found that no compensable taking occurred since the plaintiffs had taken advantage of favorable conditions created by prior

projects, and knew or should have known of the expected freshwater diversion that would adversely affect their oyster leases, and thus could not have had a legitimate investment-backed expectation that conditions would remain favorable for oyster cultivation.

SUPERVISORY JURISDICTION

Clearly, the denial of a motion for summary judgment is an interlocutory judgment from which the parties do not have the right to appeal. LSA-C.C.P. art. 1841. However, our exercise of supervisory jurisdiction is purely discretionary. LSA-C-C.P. art. 2201.

In *Scott v. Pontchartrain Materials Corp.*, 98-1611, p. 3 (La.App. 4 Cir. 8/12/98) 717 So.2d 682, 684, this court stated:

> Appellate courts must review summary judgments de novo, Act No. 483 of 1997 amended La. C.C. P. art 966 effective August 15, 1997, and it is to be applied retroactively as well as prospectively. *Perry Waller v. American Seafoods Co.*, 97-0302, p. 1 (La.App. 4 Cir. 10/1/97), 700 So.2d 1306, 1307, *writ not considered,* 97-2769 (La. 1/30/98), 709 So.2d 693.
>
> The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La.C.C.Pro. art. 966 A (2). A summary judgment shall be rendered

> forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 B. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. La.C.C.P. art. 966 C(2).

Id.

"Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact." La.C.C.P. art. 966(C)(2).

Plaintiffs initially attack defendant's need for supervisory review, citing the lack of any showing of irreparable harm. LSA-C.C.P. art. 2083 (A). However, because summary judgment is now favored, this court reviews denials of motions for summary judgments in all but the most exceptional cases. This case does not present exceptional circumstances.

COLLATERAL ESTOPPEL

We must first consider the applicable law. Relators argue for application of federal law to determine the effect of this judgment rendered by a federal court. However, respondents argue for application of state law to this suit in state court.

We must apply federal law to determine the effect of the judgment, rendered in the federal action, on the proceedings in state court. *Reeder v. Succession of Palmer*, 623 So.2d 1268, 1271 (La. 1993). We must apply federal law to "determine the **preclusive effects** of a judgment rendered by a federal court exercising federal question jurisdiction." *Id.* In the federal action, the fishermen sued under the United States' Constitution, and the federal court exercised its federal question jurisdiction. In *Reeder*, the Louisiana Supreme Court decided to apply federal law to determine the preclusive effect of a judgment from which the defendants asserted the defense of *res judicata* (or claim preclusion). Although we are asked to determine the: preclusive effect, based on collateral estoppel (or issue preclusion) of a judgment,, we are required to apply federal law.

Applying federal law to determine what effect the federal judgment has to this action, we consider the doctrine of collateral estoppel. Collateral estoppel requires the existence of three facts: (1) the issue at stake must be **identical** to the one involved in the prior action; (2) the issue must have been **actually litigated** in the prior action; and (3) the determination of the issue in the prior action must have been a necessary part of the Judgment in that earlier action. *Recoveredge, L.P. v. Pentecost*, 44 F.3d 1284, 1291 (5th Cir. 1995). Some cases recognize a fourth requirement for appli-

cation of issue preclusion, that no special circumstances exist rendering preclusion inappropriate or unfair. Id., at Fn. 12. Collateral estoppel, unlike res judicata, does not require mutuality between the parties to the prior action and the parties in the subsequent action in which the defendants raise the issue of collateral estoppel. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28L.Ed.2d 788.

Respondents argue that no identity of issues exists in the two separate actions, that the parties did not actually litigate the issue, and that fairness precludes application of collateral estoppel. An identity of issues exists when the facts and the legal standard used to assess the facts are the same in both proceedings. *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir. 1995). In the federal action, a class of oyster fishermen sued, under the United States Constitution, the federal government for compensation for a **taking**. Basically, the lessees alleged that the Caernarvon freshwater diversion project, constructed by both the federal and state government damaged their property, decreased the economic potential of their leases. They argued that this project caused conditions unfavorable to oyster growth, decreasing the value of their leases. These same fishermen/lessees sued the State of Louisiana for these same damages in this state proceeding under both the United States and the Louisiana Constitutions. We are presented in this action with the same plaintiffs seeking the same remedy for the same harm from a different defendant. Therefore, the facts in the federal action and the facts in this proceeding are exactly the same.

Essentially, we must determine whether the legal standard applied to the same facts in the federal action is the same legal standard applicable in this action. The United States and Louisiana Constitutions prevent takings by government entities without compensation. The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The Louisiana Constitution likewise provides:

> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power. Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit.

La.Const. art. 1 Sec. 4.

The federal constitutional provision protects against takings by both federal and state governments. However, the Louisiana Constitution does not protect against takings by the federal government. The Louisiana Constitution guarantees fewer protections against public takings than the United States Constitution. *State through Department of Transportation Development v. Chambers Inv. Co.*, 595 So.2d 598, 604 (La. 1992). Louisiana courts have consistently considered federal law in analyzing whether particular facts constitute a taking of property in similar **inverse condemnation** suits. *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission*, 97-1367 (La.

5/19/98); 715 So.2d 387, 392-93; *Ursin v. New Orleans Aviation Board*, 506 So.2d 947, 955 (La.App. 5 Cir. 4/15/87), *reversed for different reasons by* 515 So.2d 1087 (La. 1987); *Annison v. Hoover*, 517 So.2d 420, 423, (La.App. 1 Cir. 12/22/87); *writ denied* by 519 So.2d 148 (La. 2/12/88); *Layne v. City of Mandeville*, 633 So.2d 608, 610 (La.App. 1 Cir. 12/29/93), *writ denied* by 94-0268 (La. 3/25/94); 635 So.2d 234; *Standard Materials, Inc. v. City of Slidell*, 96-0684 (La.App. 1 Cir. 9/23/97); 700 So.2d 975, 984. Clearly, a distinction exists between claims for inverse condemnation and claims for expropriation. Louisiana courts have explicitly recognized this distinction[3] *State, through Department of Transportation and Development v. Chambers Inv. Co., supra* at 602. Moreover, in determining whether a state law so limited the use of certain property to constitute a constitutional taking, the Louisiana Supreme Court recently addressed whether fishermen owning gill nets "have a **justifiable investment backed reliance interest**." *Louisiana Seafood Management v. Louisiana Wildlife and Fisheries Commission*, 97-1367 (La.5/19/98); 715 So.2d 387, 393. [Emphasis added.] That Court cited federal authority in its analysis of whether the gill net owners/fishermen suffered a taking because the new law "diminished the economic value of their equipment." *Id.*, at 392.

[3] Respondents rely on several expropriation cases to argue that the legal standard applicable to the facts in this state proceeding differs from the legal standard applicable in the federal proceeding. Expropriation proceedings are governed by LSA-R.S. 19: 1, et seq. These statutes do not govern claims for inverse condemnation.

In the lessees' federal action, the court of appeals reasoned:

> When government limits the use a property owner may make of her property, without itself occupying or using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 1045 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978): the court considers the character of the governmental action, the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. Id., at 124, 98 S.Ct., at 2659. Though it is a truism that "no set formula exists to determine whether compensation is constitutionally required for a government restriction of property." *Hendler v. United States,* 952 F.2d 1364,1373 (Fed.Cir. 1991), see *Penn Central*, 438 U.S., at 124, 98 S.Ct., at 2659, the Penn Central formulation provides guidance in analyzing what the trial court here viewed as a question of first impression.
>
> The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit. There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to

> claim surprise, however, that the preexisting salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage.

Avenal v. United States, 915-5149 (Fed.Cir. 11/12/96); 100 F.3d 933, 937. Furthermore, the federal appeals court held, "these plaintiffs, in the words of *Penn Central*, cannot have had **reasonable** investment-backed expectations that their oyster leases would give them rights protected from -the planned freshwater diversion projects of the state and federal governments." *Id.* [Emphasis added.] Our review of the record and the applicable law persuades us that the issue decided in the federal action and the issue confronting the state court in this proceeding are identical. Therefore, we conclude that an identity of issues exists.

Respondents also argue that collateral estoppel does not apply to preclude re-litigation of their claims because the issue of whether they had reasonable investment-backed expectations, constituting a taking, was not actually litigated. Collateral estoppel is unavailable when a "new deter-mination of the issue is warranted by differences in the **quality or extensiveness of the procedure** followed in the two courts." *Copeland, supra* at 1423. [Emphasis added.] Respondents do not argue that the procedures employed by the federal court, as opposed to those procedures employed by the state court, differ. They do not even argue that the issue decided from the record on appeal was not "actually litigated." They argue only that we should disregard the federal judgment because the trial court based its conclusion on one reason, and the appeals court decided the case on another issue. We believe that the parties actually litigated

whether plaintiffs' "property interest was taken." *Avenal, supra* at 936.

Respondents argue that we should not apply the doctrine of collateral estoppel since special circumstances exist. We must consider "whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate." *Blonder-Tongue Laboratories, Inc., supra* at 329, 91 S.Ct., at 1443. The special circumstances upon which the respondents rely involve alleged errors in factual conclusions by the federal court of appeals because, as they contend, the record on appeal was incomplete. They do not allege that the federal proceedings denied them an "opportunity to litigate." Moreover, plaintiffs do not argue that the alleged circumstances resulted from the conduct of others. *Jenkins v. State*, 615 So.2d 405, 407 (La.App. 4 Cir. 1993), *writ denied* by, 617 So.2d 932. We do not believe that special circumstances exist.

CONCLUSION

Applying federal law to determine whether the doctrine of collateral estoppel precludes re-litigation of plaintiffs' claims for compensation for the diminution of the value of their oyster bed leases, we conclude that an issue necessary to their claims for relief in the state action was previously litigated and decided in the federal action. Accordingly, for the reasons discussed, we reverse the judgment of the trial court and dismiss the plaintiffs' claims under both the United States and Louisiana Constitutions, since the federal judgment precludes relitigation of an issue which a federal court has already decided.

WRIT GRANTED, JUDGEMENT REVERSED

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	

* * * * * * * *

KLEES, C.J.,- concurs and dissents for the reasons assigned by Judge McKay.

ALBERT J. AVENAL JR., ET AL	*	No. 99-C-0127
	*	
VERSUS		COURT OF APPEAL
	*	
THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES	*	FOURTH CIRCUIT
		STATE OF LOUISIANA
	*	

* * * * * * *

MCKAY, J. CONCURS IN PART AND DISSENTS IN PART

I agree with the majority opinion as it applies to plaintiffs' federal claims. However, I must respectfully dissent with the majority's finding that plaintiffs' state law claims are also precluded.

Louisiana law, which clearly pertains to the state laws claims in this case, does not recognize the doctrine of collateral estoppel. Steptoe v. Lallie Kemp Hospital, 634 So. 2d 331, 335 (La. 1994); Welch v. Crown Zellerbac Corp., 359 So. 2nd 154, 156 (La. 1978). In Welch , the Supreme Court rejected all forms of the doctrine, stating:

> Collateral estoppel is a doctrine of issue preclusion alien to Louisiana Law. Developed in the common law, the device precluded the re-litigation of issues actually decide in a prior suit between the parties on a different cause of action.

Id. at 156. Since there has been no prior suit between the leaseholders and the Department of Natural Resources,

collateral estoppel, even if it existed in Louisiana is inapplicability its own terms.

Although, the legal standard required to establish a taking under the United States Constitution is no different in state court than it is in federal court, the legal standard of what constitutes a taking is different under the Louisiana Constitution.

La. Const. Art. 1, § 4 provides in pertinent part:

> Property shall not be taken or damaged by the State or its political subdivisions except for public purposes and with Just compensation paid to owner or into court for his benefit.

There is a jurisprudentially recognized action for inverse condemnation, which arises out of "the self-executing nature of the constitutional command to pay just compensation." Slate through DOTD v. Chambers Investment Company, Inc., 595 So. 2d 598, 602 (La. 1992). The action for inverse condemnation is available in all cases where there has been a taking or damaging of property but just compensation has not been paid ... Id.

In the instant case, plaintiffs' oyster leases are a recognized property under the laws of this state. Defendants" fresh water diversion project has allegedly caused damage to this right. Further, plaintiff claims defendant has not justly compensated the plaintiffs' for their loss. Because the defendants have not paid any compensation to plaintiffs, this case may amount to inverse condemnation.

Louisiana employs a three-pronged analysis to determine whether a claimant is entitled to eminent domain compensation. Chambers, 595 So. 2d at 603.

> Under this analysis, we must first determine if a person's legal right with respect to a thing or object has been affected. In other words, we must be able to identify a recognized species of property right that has been affected, regardless of whether causes of action may exist on the theories; otherwise, it cannot be said there has been an exercise of the power of eminent domain. Second, if it is determined that property is involved, we must decide whether the property, either a right or a thing, has been taken or damaged, in a constitutional sense. If property is taken or damaged, one may say that there has been an attempted exercise of the eminent domain power. The final question then is whether the taking or damaging is for a public purpose under La. Const. Article 1 §4.

595 So. 2d at 603.

A lessee's business losses, if proved to have been caused by the State's taking or damaging of property, are compensable under the "full extent of his loss" measure of recovery. State Through Dept. of Highways v. Constant, 369 So. 2d 699 (La. 1979). The lease of state-own water bottoms for, among other purposes, oyster cultivation, is provided for by law. See La. R.S. 41:1255 and R.S. 56:421 et seq. The plaintiff-oyster lessees have a protected. property interest in their leases as found by the United States Fifth Circuit Court of Appeal. It is not disputed that this property right has been

adversely affected by state action.

Accordingly, I agree with the trial court and would not grant the summary judgment in so far as it applies to any claims which plaintiffs may have under state law.

APPENDIX D

The Supreme Court of the State of Louisiana

ALBERT J. AVENAL JR., ET AL.

vs. NO. 2000-CC-1077

THE STATE OF LOUISIANA AND THE DEPARTMENT OF NATURAL RESOURCES

IN RE: State of Louisiana et al; Department of Natural Resources, Louisiana; - Defendant(s); Applying for Supervisory and/or Remedial Writs, Parish of Plaquemines, 25th Judicial District Court Div. B, Nos. 38-266; to the Court of Appeal, Fourth Circuit, No(s). 99-C-0127, 00-C-0855

June 23, 2000

Denied.

CDK
PFC
HTL
BJJ
CDT

KNOLL, J., not on panel.
MARCUS, J., would grant the writ.
VICTORY, J., would grant the writ.

Supreme Court of Louisiana
June 23, 2000
/s/ Katherine A. Fontana
Clerk of Court
Deputy For the Court

APPENDIX E

Albert J. AVENAL, Jr., and 129 similarly situated,
Plaintiffs-Appellants,
v.

The UNITED STATES, Defendant-Appellee.

No. 95-5149

United States Court of Appeals,
Federal Circuit.

Nov. 12, 1996.

Rehearing Denied Jan. 30, 1997.

Owners of state leases for water-bottom lands used for oyster propagation filed a complaint alleging a taking of their leasehold interests resulting from federal and state freshwater diversion project, which allegedly diluted salinity level in waters above their leased grounds and caused silt deposits in leased area so as to prevent owners from continuing to cultivate oysters. The Court of Federal Claims, Christine Odell Cook Miller, J., 33 Fed.CL 778, granted summary judgment for government, and owners appealed The Court of Appeals, Plager, Circuit Judge, held that: (1) owners had property interest protected by Fifth Amendment, but (2) project did not result in constitutional taking.

Affirmed.

Martin W. Matzen, Attorney, Environment and Natural Resources Division, Department of Justice, Washington, D.C., for defendant-appellee. With him on the brief were Lois J. Schiffer, Assistant Attorney General, Jacques B. Gelin and Thorton Withers Field. Of counsel on the brief was Marco A. Rosamano, U.S. Army Corps of Engineers, New Orleans, Louisiana. Of counsel was David C. Shilton, Attorney, Environment and Natural Resources Division, Department of Justice, Washington, D.C.

Before RICH, NEWMAN and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This is a Takings case. [FN1] Albert Avenal, Jr. and 129 similarly situated plaintiffs ("Avenal" or "plaintiffs") leased oyster beds from the State of Louisiana. During the lease term, fresh-water diversion projects under the aegis of the United States altered the salinity level in the water over the oyster beds, thus rendering the beds unsuitable for oyster cultivation. Plaintiffs brought suit in the Court of Federal Claims alleging a taking by the United States ("Government") in violation of the Fifth Amendment of the Constitution. The Court of Federal Claims on summary judgment dismissed the claims, holding that Avenal never acquired a constitutionally protectable property interest. We affirm the judgment of the Court of Federal Claims, although on different grounds.

FN1. "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

BACKGROUND

The properties involved in this case are in The Breton Sound Basin, a part of the coastal waters of Louisiana lying east of the Mississippi River and south of New Orleans. Because the area contained a broad mixing zone of freshwater outflow from the Mississippi River and smaller coastal streams and the saline waters of the Gulf of Mexico, the area historically provided excellent conditions for oyster growth.

But life for the oysters, and for those who made their living harvesting them, did not remain sweet. Oysters to thrive need a salinity level ranging from 5 parts per thousand to 15 parts per thousand. Over time, both man-made and natural changes to the area caused the salinity levels in the sub-delta marsh lands below New Orleans to increase. The parties attribute the changes in salinity primarily to man-made causes, including the establishment of a levee system for flood control on the Mississippi, and oil and gas exploration that involved extensive canal networks. The natural changes stemmed from subsidence, shoreline erosion, and drought, all adding to the saltwater intrusion.

There is evidence that as early as 1900 the relevant state agencies and various parishes (similar to counties) were considering the idea that freshwater be diverted from the Mississippi River to adjacent marsh lands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity. In 1959, in a memorandum written by the United States Department of the Interior's Fish and Wildlife Service to the United States

Army Corps of Engineers ("Corps"), the Interior Department set forth its conclusions resulting from an investigation into the advisability of establishing *935 freshwater diversions via structures to be built for that purpose. The investigation itself was prompted, in part, by requests from local groups, including the oyster industry, concerning the need for such diversions.

The 1959 memorandum discussed a marked reduction in oyster yield that had occurred over time, and concluded that freshwater diversion would be beneficial in that it would re-establish natural patterns of salinity and increase oyster- bed fertility. The memorandum identified four separate areas in Plaquemines Parish as freshwater diversion sites, two of which are on the east side of the Mississippi. One of these two, Area 4, is in the vicinity of Scarsdale, in the upper landward end of the Breton Sound Basin. The area was described in the memorandum as itself being too fresh to support an oyster fishery, so that the effect of the Area 4 diversion would not be to change the salinity levels themselves, but to combat the effects of subsidence and push back salt-water intrusion.

The 1959 memorandum was later incorporated into House Document No. 308, which led to the passage, on October 27, 1965, of the Public Works--Rivers and Harbors Act, Pub.L. No. 89-298,79 Stat. 1037 (1965) (the "Act"), which authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin. During 1968 and 1969 the Corps met with, among others, the Louisiana Wildlife and Fisheries Commission and the Plaquemines Parish Commission Council to discuss proposed locations

for these Congressionally-authorized diversion structures. During public hearings, the Corps proposed Caernarvon as the location of the freshwater diversion structure for Area No.4.

Meanwhile, due to continuing salinity changes the zone favorable for oyster growth continued to move landward. This landward salinity movement spawned an oyster community in the marsh lands in the northwest portion of the Breton Sound Basin, in the area which had previously been too fresh to sustain such growth. While creating new oyster grounds, the change in salinity had the effect of rendering unusable large areas of previously productive oyster grounds. During the 1970's oyster farmers engaged in the spawning and harvesting of oysters noted the changed conditions in the northwest landward part of the Basin and entered into water-bottom lease agreements with the State of Louisiana for the areas then usable as oyster beds.

Over the ensuing years the Corps and relevant state and local agencies continued to discuss at informal meetings the construction of a freshwater diversion structure at Caernarvon. It was known by all parties, including both the state and plaintiffs, that the Caernarvon project would create an area in which conditions again would become too fresh for oyster cultivation, and that this area would coincide with an area which had been formerly too fresh for oyster cultivation. On January 21, 1982, the State of Louisiana submitted a letter to the Corps, announcing its intent to participate in the Caernarvon freshwater diversion project. The Corps and the State issued a joint public notice regarding the construction surrounding the Caernarvon project.

On October 30, 1986, Congress authorized the funds for the construction of the Caernarvon project The State of Louisiana entered into a formal agreement with the Corps stipulating that the State would maintain and operate the facilities following completion of construction, and that the State would be responsible for 25 percent of the total costs of construction. The agreement further provided an indemnification clause under which the State would indemnify the Federal Government for any losses occasioned by claims for "damages arising from the construction, operation, maintenance, and rehabilitation of the project..." The Caernarvon project was completed in due course, and it had the expected effect on the salinity levels in the Breton Sound Basin. Although the Caernarvon project was not itself completed until 1991, other freshwater diversion structures, upon which Caernarvon was modeled, had been completed earlier, some going back as early as 1956 (Bayou Lamoque) and 1964 (White Ditch Siphon).

On April 26, 1994, plaintiffs, who owned leases from the State of water- bottom lands used for oyster propagation, filed a complaint ***936** in the United States Court of Federal Claims, alleging a taking of their leasehold interests resulting from the Caernarvon project. Specifically, plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds and caused silt deposits in the leased area. These conditions were not favorable to oyster growth. As a result, the Government's Caernarvon project prevented them from continuing to cultivate oysters an their leased beds.

The Court of Federal Claims granted the

Government's motion for summary judgment on the grounds that the oysterers held no compensable property interest Since the State acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds, plaintiffs could have acquired no such right from the State, and thus no property interest to be taken. Plaintiffs appeal that determination.

DISCUSSION

[1][2][3] Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. On appeal, the views of the trial court regarding the applicable law in light of the undisputed facts are given full consideration, but a grant of summary judgment is reviewed without special deference to the trial court's decision. In this case, though the parties disagree about certain factual issues, the facts material to the decision are not in genuine dispute. Summary judgment is fully appropriate in such a case; that it is a takings case does not affect the availability of summary judgment when appropriate to the circumstances.

[4] The case was argued below, and the trial judge based her decision, on the issue of whether these plaintiffs owned a compensable property interest. Much of the argument there, as on appeal, focused on whether plaintiffs have a vested right, derived from the State, in an unintended benefit resulting from a federal government project, such that cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment.

The record establishes that plaintiffs own long-term leases from the State, which leases entitle plaintiffs to use the lands under the waters of the Breton Sound Basin for the cultivation and harvesting of oysters. No challenge is made to the right of the State to issue such leases, or to the right of the lessees to engage in the activity for which the leases are issued. The record does not establish exactly when the several plaintiffs first acquired their leases. The trial court, in absence of evidence from the plaintiffs, made the reasonable inference that, for purposes of plaintiffs' complaint, the leases should be considered to have been entered into no earlier than 1976. This was arrived at by subtracting the term of the leases, 15 years, from the date on which the freshwater diversion from the Caernarvon project became operational, 1991.

[5] The leases owned by the several plaintiffs granted them valuable property rights. Louisiana law has long recognized that the property rights created by such leases, authorized by state statute (see La.Rev.Stat.Ann. § 56:423 (West 1995)), have the attributes of other forms of real property, and are entitled to protection from injury by third parties. See e.g., Inabnet v. Exxon Corp., 642 So.2d 1243 (La.1994) (Oil company found liable to oyster lessee for any damages sustained by oyster lessee due to company's dredging of canal.); Butler v. Baber, 529 So.2d 374 (La.1988) (Oyster lessees could recover against mineral lessees for damage to oyster beds and oyster production caused by mineral lessees' dredging operation). The United States Constitution protects such state-created property interests from uncompensated takings by government, whether that government be state, Lucas v. South Carolina

Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), or federal, Hendler v. United States, 952 F.2d 1364 (Fed.Cir.199i).

[6] The question, then, is not whether the plaintiffs had a constitutionally protected property interest, but whether that property interest was taken by the Government The leasehold estates owned by the plaintiffs entitle them to use the beds of the Basin for the ***937** cultivation of oysters. **[FN2]** The result of the series of government decisions that culminated in the Caernarvon project was not to occupy the plaintiffs' property or to have that property used for government purposes, but was to limit the uses of the property available to plaintiffs. There can be no doubt from the record that the limit on plaintiffs' use imposed by the Government's activities had the effect of substantially reducing the value of plaintiffs' property, well beyond the level of "mere diminution." Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570 (Fed.Cir. 1994).

FN2. The trial judge found that the record does not reflect the exact location of plaintiffs' leases. The trial court concluded that, in absence of other proof, the plaintiffs concede that the leases are located in the northwest landward end of the Breton Sound Basin.

[7] When government limits the use a property owner may make of her property, without itself occupying or otherwise using the property for government purposes, the classic analytical tool for assessing whether a taking has occurred is the three-part test enunciated by the Supreme Court in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978): the court considers the character of the governmental action,

the economic impact on the claimant and, particularly, the extent to which the governmental action has interfered with distinct investment-backed expectations. Id. at 124,98 S.Ct. at 2659. Though it is a truism that "no set formula exists to determine whether compensation is constitutionally due for a government restriction of property," Hendler v. United States, 952 F.2d 1364, 1373 (Fed.Cir.1991), see Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659, the Penn Central formulation provides guidance in analyzing what the trial court here viewed as a question of first impression.

The case before us presents a textbook example of a situation in which the plaintiffs, in the face of established public concerns and while governmental efforts to address those concerns were well known, moved to take advantage of the existing conditions for their own economic benefit There is nothing wrong with their having done that; the State of Louisiana provided the mechanism for it, and their own initiative gave them whatever economic advantages the situation afforded. It is hard for them to claim surprise, however, that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to 100 F.3d 933 their (this time) disadvantage.

Though as entrepreneurs they are entitled to capitalize on the opportunities afforded by government action, they cannot here insist on a guarantee of non-interference by government when they well knew or should have known that, in response to widely-shared public concerns, including concerns of the oystering industry itself, government actions were being planned and executed that would

directly affect their new economic investments. These concerns and plans date back to the early part of the century, and beginning in the 1950's and 1960's were actively being pursued by state and federal agencies. They were certainly a part of the environment in which the raising and harvesting of oysters in the Louisiana marshes were conducted. Assuming, as we must, that these plaintiffs did not invest in their leases until the 1970's, these plaintiffs, in the words of Penn Central, cannot have had reasonable investment-backed expectations that their oyster leases would give them rights protected from the planned freshwater diversion projects of the state and federal governments.

The arguments put forward by plaintiffs do not persuade us otherwise. We grant that they have valuable property rights created by the State and protected by the Constitution. These rights include the right to harvest oysters and the right to damages when the acts of another harm the oyster beds, including harm caused by deleterious changes in the waters in which the beds lie, for example by unlawful pollution.

We grant that the decrease in salinity in the water covering the plaintiffs' leased grounds has restrained a valuable use of the lease rights. And plaintiffs are correct that the existence of certain hold-harmless clauses in some of the leases for the benefit of the federal government and against the state does not *933 change the case. Having said all that, however, what we do not grant these plaintiffs is the right to be free from the planned and announced efforts of the Government to act in ways that would affect their uses

of their after-acquired property interests. **[FN3]** In light of the history of events in this case, plaintiffs as a matter of law must be assumed to have known that their rightS to use the bottom-lands for oystering were subject to the inevitable changes that the anticipated government program would bring about.

FN3. Plaintiffs' heavy reliance, particularly in their reply brief, on the panel opinion in Preseault v. United States, 66 F.3d 1167 (Fed.Cir.1995), and particularly the role of federal law in defining state property rights, it of course not persuasive since that opinion has since been vacated by vote of the in banc court. See 66 F.3d 1190 (Fed.Cir. 1995).

We reach, then, the same result as the trial court. In this case there was no taking by the United States of a protected property interest. The judgment of the trial court is

AFFIRMED.

END OF DOCUMENT

APPENDIX F

Albert J. AVENAL, Jr., et al. Plaintiffs,
v.

The UNITED STATES, Defendant.

No. 94-261L.

United States Court of Federal Claims.

Aug. 2, 1995.

Lessees of waterbottoms used for oyster farming brought action alleging taking of their leasehold interests as result of freshwater diversion project On government's motion for summary judgment, the United States Court of Federal Claims, Miller, J., held that lessees lacked compensable property interest in salinity of water for purposes of Fifth Amendment takings claim.

Motion granted.

Thornton Withers Field, Washington, DC, with whom was Asst. Atty. Gen. Lois J. Schiffer, for defendant Marco A. Rosamano, U.S. Army Corps of Engineers, New Orleans Dist. RED VOID of counsel.

OPINION

MILLER, Judge.

This case is before the court after argument on

defendant's motion for summary judgment. The issue is whether plaintiffs, who lease certain water- bottoms in the Breton Sound Basin, Louisiana, for oyster farming, hold a compensable property interest for purposes of the Fifth Amendment

FACTS

The following facts are undisputed, except where noted. On October 27, 1965, Congress enacted the "Public Works--Rivers and Harbors Act," Pub.L. No. 89-298, 79 Stat. 1073 (1965) (the "Act"), which authorized certain freshwater diversion structures to be built in and around the Breton Sound Basin, which lies east of the Mississippi River and south of New Orleans, Louisiana. The location and description of the approved structures originally were set forth in a memorandum dated June 16, 1959, from the United States Department of the Interior, Fish and Wildlife Service to the United States Army Corps of Engineers (the "Corps") (the "1959 memorandum") and later incorporated into House Document No. 308, which Congress approved in the Act.

The 1959 memorandum represents the conclusions of the Fish and Wildlife Service concerning its investigation as to the advisability of introducing fresh water from the Mississippi River into the sub-delta marshes below New Orleans, Louisiana, via freshwater diversion structures. The investigation was prompted, in part, by requests from local groups, including the oyster industry, which attended a public hearing in New Orleans on April 25, 1955, concerning the need for freshwater diversions.

The coastal waters of Louisiana historically provided excellent conditions for oyster growth, because the area contained a broad mixing zone of freshwater outflow from the Mississippi River and smaller coastal streams and the saline waters of the Gulf of Mexico. According to the 1959 memorandum, certain man- made and natural causes, over time, had increased the salinity level of the sub-delta marsh lands below New Orleans, thereby adversely affecting fish and ***780** wildlife, including oysters, waterfowl, and fur animals. The parties attribute the changes in salinity primarily to man-made causes, including the Federal Government's involvement in the creation of a levee system for flood protection of the Mississippi River and the oil and gas industry's creation of extensive canal networks. The record indicates that the Corps became involved in levee projects as early as 1927. **[FNI]** The natural causes resulting in increased salinity stemmed from subsidence, shoreline erosion, and severe drought

FNI. Defendant's expert, Coastal Environments, Inc., states in a report dated February 1995, at p. 2-14:
"Following the great flood of 1927, the Mississippi River Commission and the Corps of Engineers devised a plan to direct flood waters safely to the Gulf. The plan included channel straightening and training, levee improvements, and construction of several major spillways or floodways...." Defendant acknowledges that the state did play a role in the flood control projects. These facts are recited as background.

The optimal salinity level for oysters ranges from 5 parts per thousand ("ppt.") to 15 ppt. Oysters, for various reasons, cannot survive in salinity levels beyond this range. The 1959 memorandum specifies that, as early as 1900, the

Louisiana Wildlife and Fisheries Commission [FN2], its predecessors, and various parishes had recommended that freshwater be diverted from the Mississippi River to adjacent marsh lands in order to improve oyster habitats and to reduce the mortality rate associated with increased salinity.

FN2. Although the Louisiana Wildlife and Fisheries Commission has been renamed on various occasions before and after 1959, the court, for purposes of clarity, shall refer to the organization under this name.

After finding "a marked reduction [in oyster yield] per unit area" over time, [FN3] the Fish and Wildlife Service in the 1959 memorandum concluded that "[introduction of fresh water to re-establish natural patterns of salinity and alluviation and increase fertility would provide the most effective method of restoring fish and wildlife production." (Emphasis added.) The 1959 memorandum identified four separate areas in Plaquimines Parish as freshwater diversion sites, two of which were located on the west side of the Mississippi, Areas No. I and 3, and two on the east side, Areas No.2 and 4. The diversion structures were designed to benefit both public seed grounds and privately-held water-bottom leases obtained from the state for oyster farming.

FN3. Plaintiffs contend that Louisiana's oyster production has remained constant for three decades. Although defendant does not dispute this proposed finding, in response to a separate proposed finding, defendant proffered expert reports which stipulate that" '[w]hile Louisiana's oyster production from private grounds has remained relatively stable during 1961-1988 ranging from 7.5 to 10.1 million pounds, the acreage devoted to the production of these oysters has increased more than five times.'" Def's Reply to Plfs' Statement of Genuine Issues of Fact No. 27, filed June 2, 1995

(quoting Berrigan, et al. (1991)). Although the 1959 memorandum supports defendant's position, the court does not resolve this issue on summary judgment. It is not material to the issue for resolution, in any event.

The freshwater diversion control structure for Area No.4, to be located in the vicinity of Scarsdale, in the upper landward end of the Basin, was intended to carry waters to Grand Lake. The 1959 memorandum defined Area No. 4 as being "too fresh to support an oyster fishery, but ... one of the best muskrat marshes in Louisiana...." According to the memorandum, "[w]ater discharge requirements in this area differ[ed] from the other [three] areas in that the major purpose ... [was] not to effect a 50 percent dilution.... [but] rather to prevent and push back salt-water intrusion ... to combat the effects of subsidence and destruction of vegetation by muskrats...." The memorandum finally stated:
"Pollution would not be a problem in Area No. 4 as in the other areas because an oyster fishery ... [was] not present..." Thus, as of 1959, areas in the vicinity of Scarsdale, located in the upper landward end of the Breton Sound Basin, had no recognizable oyster industry because the waters were too fresh to sustain such a habitat.

Between 1968 and 1969, the Corps met with local interests, including the Louisiana Wildlife and Fisheries Commission and the Plaquemines Parish Commission Council, to discuss proposed locations for the diversion structures authorized by Congress. During Corps-sponsored public hearings held in November *781 and December 1968, the Corps proposed Caernarvon as the situs of the freshwater diversion structure for Area No. 4 to be located on the cast side of the Mississippi.

[FN4] According to defendant's expert report, Caernarvon is located "only a few miles downstream" from Scarsdale. Report of Coastal Environments, Inc., pp. 4-6 (Feb. 1995). It is within the general vicinity of Scarsdale, a fact that plaintiffs do not dispute, and therefore falls within the area described by the 1959 memorandum as the site for the control structure at Area No.4.

FN4. The record is unclear as to whether the 1968 and 1969 meetings were intended to identify the diversion structure locations for the areas discussed in the 1965 Act, or whether such meetings concerned other non-authorized diversion projects. When questioned as to the purpose of the meetings, defendant implied that the meetings occurred in response to the Act. Defendant, however, did not respond as to whether the 1968 and 1969 meetings pertained to Areas No. 2 and 4, discussed in the 1959 memorandum. Given the substance of the 1959 memorandum, the court infers that the meetings did address proposed locations for Areas No. 2 and 4.

In 1969 the Louisiana Wildlife and Fisheries Commission, the Plaquemines Parish Commission Council, and the Corps agreed to construct a freshwater diversion structure in the vicinity of the Nestor Canal in the Bohemia Spillway area on the east bank of the Mississippi River. In discussing Area 2, the second diversion structure to be located on the east bank, the 1959 memorandum specified that the diversion structure should be built in the vicinity of Bohemia; the Nestor Canal satisfies this locational requirement

During the 1970's the zone favorable for oyster growth continued to move landward, due to salinity changes. This landward salinity movement spawned an oyster community in the marsh lands in the northwest portion

of the Breton Sound Basin, which had previously been too fresh to sustain such growth. While creating new oyster grounds, the inland movement of salinity had the deleterious effect of rendering unusable large areas of previously productive oyster grounds. **[FN5]** Many in the oyster industry noted the changed conditions in the northwest landward part of the Basin and entered into water-bottom lease agreements with the Louisiana Wildlife and Fisheries Commission. The leases extended for 15 years and covered a maximum of 1,000 acres. **[FN6]**

FN5. The massive oyster mortality on formerly productive private leases and state seed grounds had been a source of concern for the State of Louisiana since the 1940s.

FN6. The lease includes both general provisions and conditional clauses, the latter of which are project-specific. The general provisions of the lease changed over time. In 1976 the Louisiana Wildlife and Fisheries Commission inserted the following: "This lease is also subject to Commission policies not stipulated by regulations...." Def's Proposed Findings of Fact No. 73, filed Feb. 7, 1995. Between 1988 and 1990, the Commission again modified the lease to include a hold-harmless provision, which precluded lessees from seeking damages from the state for losses resulting from freshwater diversion projects. According to defendant, leases issued prior to the 1988-1990 timeframe were not amended to include a hold-harmless clause.

Between 1978 and 1982 the Corps and relevant state and local agencies continued to discuss at informal meetings constructing a freshwater diversion structure at Caernarvon. On January 21, 1982, the State of Louisiana submitted a letter to the Corps, announcing its intent to participate in the Caernarvon freshwater diversion project. The Corps and the Louisiana Department of Natural Resources

issued a joint public notice as to the construction surrounding the Caernarvon project in 1982. In May 1982 the Corps also issued a draft report and environmental impact statement, entitled Louisiana Coastal Area, Louisiana, Feasibility Report on Freshwater Diversion to Barataria and Breton Sound Basins, addressing the importance of the Caernarvon structure. The Corps issued the final report in September 1984.

The final report provided for only one large freshwater diversion structure to be constructed at Caernarvon, even though the Act authorized the construction of two smaller structures on the east side of the Mississippi River. **[FN7]** "The zone where conditions ***782** will become too fresh for oyster cultivation as a result of the [Caernarvon] diversion coincides with an area that was historically (prior to 1960) too fresh and not favorable for oyster cultivation." Defs Proposed Findings of Fact No. 8, filed Feb. 7, 1995 (citations omitted). Plaintiffs do not dispute this fact.

[FN7]. Although during argument the court inquired of defendant as to the date of the decision to consolidate the two structures designated in the 1959 memorandum, defendant could not provide the exact date on which the decision was made. Information of record, however, does indicate that the decision was made by 1982.

The Caernarvon project was designed not only to abate saltwater intrusion, but also to abate marine tidal invasion. At the July 31, 1984 public hearing, the President of the Louisiana Oyster Dealers and Growers indicated his support for both the Caernarvon project and freshwater diversion structures generally.

On October 30, 1986, Congress authorized the funds for the construction of the Caernarvon project through the Fiscal Year 1987 Energy and Water Development and Appropriations Act, Pub.L. No. 99-591, 100 Stat 3341, 3341-195 (1986). Although the State of Louisiana expressed its intent to participate in the Caernarvon project as early as January 1982, the state did not enter into a formal cooperation agreement with the Corps until June 10, 1987. That agreement identified the Caernarvon project as one of the four sites originally authorized by the Act:

> WHEREAS, the Mississippi River and Tributaries Project was authorized by the Flood Control Act of 1928 (May 15, 1928, Public Law No. 70-391) and modified and expanded by the Flood Control Act of 1965 (October 27, 1965, Public Law 89-298) to include the Mississippi Delta Region Project as recommended by the Chief of Engineers in House Document No. 308,88th Congress, 2d Session; and WHEREAS, the Caernarvon Freshwater Diversion Structure (hereinafter referred to as the "Project") is one of the four sites authorized under the Lower Mississippi Delta Region project by the Flood Control Act of 1965 (October 27, 1965, Public Law 89-298)....

(Emphasis added.)

The agreement stipulated that the state shall maintain and operate the facilities following completion of construction, and that the state shall be responsible for 25 percent of the total costs of construction. The agreement further provided an indemnification clause, whereby the state would indemnify the Federal Government for any losses occasioned by claims for "damages arising from the

construction, operation, maintenance, and rehabilitation of the project, except [that the state would not indemnify] for damages due to the fault or negligence of the Government or its contractors."

Construction commenced at the Caernarvon site on June 7, 1988, and was completed in February 1991. The Caernavon project, however, was not the first freshwater diversion structure to be constructed in the area. The State of Louisiana constructed the Bayou Lamoque freshwater diversion structure in 1956 and expanded the structure in 1975. Other diversion structures in the area included the White (or Whites) Ditch Siphon, completed in 1964. The Caernarvon project, in fact, was modeled after these smaller state and local ventures, which had proved effective in restoring oyster production previously destroyed by excessive salinities.

On April 26, 1994, several owners of water-bottom leases, who, at the earliest, acquired their leases for oyster farming by 1976, **[FN8]** filed a complaint in the United States Court of Federal Claims, alleging a taking of their leasehold interests resulting from the Caernarvon project. Specifically, plaintiffs alleged that the Caernarvon project diluted the salinity level in the waters above their leased grounds and caused silt deposits in the leased area. These conditions were not favorable to oyster growth, and therefore plaintiffs claim that the Federal Government through the Caernarvon project disabled them from continuing to cultivate oysters.

FN8. The record is devoid of any evidence as to the exact dates on which the plaintiffs acquired their leases. During argument, defen-

dant explained that he derived the 1976 date by subtracting 15 years, the length of the state lease, from the date on which Caernarvon opened, which was 1991.

Although the record does not reflect the exact location of plaintiffs' leases, plaintiffs concede that the leases were located in areas which prior to 1960 were too fresh to sustain *783 oyster growth. See Plfs' Br. filed May 2, 1995, at 3 (stating that "saltwater intrusion has led to the displacement of areas previously (pre-1960) having favorable oyster growing conditions in the outer Breton Sound Basin and the development of additional, inner Breton Sound Basin areas more favorable to oyster growing conditions, which were previously (pre-1960) too fresh for oyster habitats....') (citations omitted). In defining the location of these areas previously too fresh for oyster development, plaintiffs discuss the northwest Landward end of the Breton Sound Basin, which is the same general area covered by Area No. 4 identified in the 1959 memorandum.

Plaintiffs also filed a motion for class certification on April 26, 1994, seeking to certify as a class hundreds of oyster lessees of water bottoms in the vicinity of the Breton Sound Basin whose leases had been impaired by the activity of the Federal Government through the Caernavon project There are 130 named plaintiffs in the action, some of whom hold an undivided fractional interest in only a few acres; others are the sole lessees of 1,000 acres, the maximum amount that may be leased under state law. In an order dated July 21, 1994, the court deferred decision on the motion.

Defendant moved for summary judgment, arguing

that plaintiffs' takings claim must fail because they lack a compensable property interest for purposes of the Fifth Amendment. In support of their opposition, plaintiffs filed additional proposed findings of uncontroverted fact pursuant to RCFC 56(d). Specifically, plaintiffs note that over 25 years had passed between the issuance of the 1959 memorandum proposing four diversion structures, two of which were to be located on the east bank of the Mississippi River, and the issuance of the final report in 1984, listing Caernarvon as the only freshwater diversion site on the east bank. Accordingly, plaintiffs maintain that they could not be charged with notice as to the exact locations or specific effects of the Caernarvon project.

Defendant rejoins that "[b]ecause of the natural configuration and hydrology of the Breton Estuarine Basin, the upper and middle basins would have become fresher regardless of the specific location of the diversion or regardless if one or more structures had been built...." Def's Reply to Plfs' Statement of Genuine Issues of Fact No. 64, filed June 2, 1995. Defendant points out that plaintiffs do not contest that one of the original objectives of the project was to restore historic freshwater conditions to the upper and middle basins. Moreover, the record shows that the areas leased by plaintiffs historically were too fresh for oysters to flourish.

Plaintiffs also maintain that they reasonably could not have foreseen where salinity changes would occur due to the project, because the Corps erred in forecasting future salinity ranges in its final report issued in 1984. Plaintiffs contend that the Corps' projected salinity estimates are

inconsistent with actual data obtained once the project was operational. Defendant disputes this characterization, claiming that the report identified long-term salinity estimates and, therefore, that it is inappropriate to cite data received over a one- to two-year period and point to inaccuracies. In addition, defendant contends that the evidence accumulated to date has shown both that the project's benefits with respect to the public seed grounds had exceeded expectations and that historic salinity conditions were being restored, a stated goal of the project See Def's Statement of Genuine Issues in Reply to Plfs' Additional Proposed Findings of Uncontroverted Fact No. 4, filed June 2, 1995 (quoting Memorandum from Robert L. Ancelet, 1994-95 Oyster Season Forecast (1994)) (stating that "[i]n Coastal Study Area II, oyster availability has increased for the third consecutive year, an unprecedented reversal of the general trends observed since 1975....' ").

Finally, plaintiffs assert that the Caernarvon Project has increased the areas subject to seasonal closures. The Louisiana Department of Health periodically closes certain areas of leased water bottoms throughout the season due to increased levels of fecal coliform, a bacterium. Defendant questions the support plaintiffs cite for their factual assertion. Defendant further contends that the problems associated with increased levels of fecal coliform have plagued oyster farmers ***784** for years. The increased levels occur as a result of many factors, including pollution from urban runoff, which occurs frequently following heavy or torrential rainfall. Defendant also notes that the closure areas highlighted by plaintiffs are not restricted to the Caernarvon area and that the areas approximate the scope of those

occurring prior to the opening of the Caernarvon structure.

DISCUSSION

I. Summary judgment

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Only disputes over material facts, or facts that might significantly affect the outcome of the suit under the governing law, preclude an entry of judgment Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of establishing that there are no genuine material issues in dispute and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548,2552, 91 L.Ed.2d 265 (1986).

[l][2] Due to the ad hoc nature of takings inquiries, the issues involved are normally fact issues that must be determined either on the entirety of a complete record or at trial. Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1560 (Fed.Cir.1985); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 891 (Fed.Cir.l983). The harsh finality of summary judgment also dictates 'its application must be accompanied by great care in respect of the entire record and the relevant law....' Yuba Goldfields, 723 F.2d at 891. In Celotex the Supreme Court stated:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential

to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof...
477 U.S. at 322-23, 106 S.Ct. at 2552. An opponent of summary judgment 'must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant....' Barmag Banner Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831,836 (Fed.Cir. 1984); sec Union Carbide Corp. v. American Can Co., 724 F.2d 1567, 1571 (Fed.Cir.l984). Argument and assertions of counsel cannot substitute for factual statements under oath that establish a genuine issue of material fact Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1404 (Fed.Cir.1984). If defendant submits an affidavit on a material point, plaintiffs must respond with an affidavit. See Royal Indem. Co. v. United States, 178 CT.CL. 46, 51, 371 F.2d 462, 465, cert. denied, 389 U.S. 833, 88 S.Ct. 33, 19 L.Ed.2d 93 (1967). Nonetheless, an opponent of summary judgment is entitled to "all applicable presumptions, inferences, and intendments." H.F. Allen Orchards v. United States, 749 F.2d 1571, 1574 (Fed.Cir.1984), cert. denied, 474 U.S. 818, 106 Set 64, 88 L.Ed.2d 52(1985).

Although '[t]he fact-intensive nature of just compensation jurisprudence to date ... argues against precipitous

grants of summary judgment ..., [t]here... [are] cases in which the United States as the mo'~ing party is 'entitled to judgment as a matter of law, and where it is quite clear what the truth is....' Yuba Goldfields, 723 F.2d at 887 (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944)). Because the parties do not dispute the facts material to a dispositive issue, this is an example of such a case.

2. Takings

[3] For a takings claim to succeed under the Fifth Amendment, under either a physical *785 invasion or regulatory takings theory, a claimant must first establish a compensable property interest. Lucas v. South Carolina Coastal Council, --- U.S. ----, ---- - -----, 112 S.Ct 2886, 2899-900, 120 L.Ed.2d 798 (1992); Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 100 S.Ct 383, 392-93, 62 L.Ed.2d 332 (1979); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580 (Fed.Cir. 1993); Preseault v. United States, 27 Fed.C1. 69, 84 (1992), appeal pending, No. 93-5067 (Fed.Cir. argued Dec. 9, 1993); see M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed.Cir. 1995) (holding that takings claim involving governmental action resulting in land use restriction requires two-step analysis, first is to identify whether compensable property interest exists).

[14] However, "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them...." United States v. Willow River Power Co., 324 U.S. 499, 502, 65 S.Ct 761, 764, 89 L.Ed. 1101 (1945); see Penn Cent Transp. Co. v.

New York City, 438 U.S. 104, 124-25, 98 S.Ct 2646, 2659, 57 L.Ed.2d 631 (1978) (noting that courts dismiss takings claims where "the challenged government action [which] caused economic harm ... d[oes] not interfere with interests that ... [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes") (citations omitted); Skip Kirchdorfer, 6 F.3d at 1580 (holding that '[n]ot all losses generate a Fifth Amendment taking....'; landowner must establish "a legally-cognizable property interest") (citation omitted); Shanghai Power Co. V. United States, 4 Cl.Ct 237 (1983) (same), affd, 765 F.2d 159 (Fed.Cir.) (Table), cert. denied, 474 U.S. 909, 106 S.Ct. 279, 88 L.Ed.2d 243 (1985). For example, a landowner cannot acquire a property interest in the high-water level of a navigable river. Willow River, 324 U.S. at 511, 65 S.Ct. at 768; see Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 87-88, 33 S.Ct. 679, 680, 57 L.Ed. 1083 (1913) (holding that landowner holds title to submerged lands under navigable waters, but title is qualified because it is subordinate to United States' right of navigation).

[5] Once a legally-cognizable property interest is established, the court must identify the nature of the taking, be it physical or regulatory. If the governmental action constitutes a regulatory taking, the court then applies the well-established three-prong test, requiring analysis of " 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed, expectations.' " Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984) (quoting PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83,

100 S.Ct. 2035, 2042, 64 L.Ed.2d 741 (1980)) (citations omitted).

[6] Without providing authority, plaintiffs argue that they need not establish the existence of a compensable property interest when the governmental action effects a physical taking. Defendant rejoins that the compensable property interest requirement applies regardless of the nature of the taking. The court agrees with defendant: The issue on defendant's motion is whether plaintiffs hold a compensable property interest.

To make this determination, the court must evaluate plaintiffs' " 'bundle of rights' " as of the time they acquired the property at issue, which, at the earliest, in this case occurred in 1976. Lucas, ---U.S. at----, 112 S.Ct. at 2899; Preseault, 27 Fed.Cl. at 87. The court must also examine " " 'existing rules or understandings that stem from an independent source such as state law to define the range of interests that qualify for protection as 'property' under the Fifth (and Fourteenth) Amendments.' " Lucas, --- U.S. at ----, 112 S.Ct at 2901 (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct 2701, 2709, 33 L.Ed.2d 548 (1972)) (emphasis added; citations omitted); see Preseault, 27 Fed.Cl. at 87 (ruling that Lucas' approach for determining the existence of compensable property interest applied to cases concerning regulations that cause or authorize physical invasions).

3. Compensable property interest

[7] This case, which involves multiple federal

projects, [FN9] multiple benefits, and multiple *786 causes, is sui generis. Generally, the case involves a situation wherein the Federal Government performed various public works projects, including erecting levees in the Mississippi River area. Although the levees had the intended benefit of halting the continued flooding of the Mississippi River, they had the unintended effect of increasing the salinity level in the marsh lands of the Breton Sound Basin. The increased salinity resulting from the levee projects caused the zone favorable for oyster growth to move inland over the years, thereby creating areas favorable for oyster growth. Prior to 1960 the same areas were too fresh to sustain such growth.

FN9. Although the state contributed 25 percent of the overall costs of the Caernarvon project, the project, for purposes of this case, was federal in nature. See Vuljan v. Board of Comm'rs of the Port of New Orleans, 170 So.2d 910, 912-13 (La.Ct.App.), writ refused by 247 La. 616, 172 So.2d 701 (1965).

Plaintiffs do not dispute that the salinity in the marsh lands increased primarily because of federal levee projects and canal work undertaken by private industry. Plaintiffs even admit that the 'saltwater intrusion ... was largely due to the vast systems of levees which Defendant itself constructed....' [FN10] Plfs' Br. filed' May 2, 1995, at 26. Plaintiffs also admit that the areas they leased were too fresh prior to 1960 for oysters.

FN10. While plaintiffs assert that the unintended effect of salinity resulted 'largely' from federal levee projects, Plfs' Br. filed May 2, 1995. at 26, the court notes that defendant refers to both state and federal efforts in the area of flood control. To give plaintiffs the benefit of 'all applicable presumptions, inferences, and intendments,' H.F. Allen Orchards, 749 F.2d at 1574, the court adopts

plaintiffs' characterization that the Federal Government largely was responsible for the unintended benefit of salinity.

Defendant argues that regardless of how the court characterizes the taking allegedly resulting from the operation of the Caernarvon project, plaintiffs hold no 'property right in the maintenance of artificially high salt water in the area of the[ir] leases." [**FN11**] Defs Br. filed May 31, 1995, at 1. Defendant's argument is premised on the notion that plaintiffs hold no compensable property interest in the value of their leases, given the congressional authorization of freshwater diversion structures in 1965. This argument implicates the decision in Preseault, which held that federal law inherently limited the expectancy of an owner of a reversionary interest in a railroad easement.

FN11. In their complaint and additional proposed findings of fact submitted pursuant to RCFC 56(d), plaintiffs contend not only that the Caemarvon project adversely affected salinity levels, but also that the project caused silt deposition on their oyster beds, destroying their harvests. Defendant disputes plaintiffs' characterization, maintaining that plaintiffs' leases could not have been affected by silt deposits because the evidence demonstrates that silt falls out before the 5 ppt. isohaline level.

Although the parties dispute the issue of siltation, it will not preclude entry of judgment on defendant's motion. RCFC 56(d)(1) requires the proponent of a proposed finding (here plaintiffs offered this fact as an additional proposed finding under RCFC 56(d)(1) to provide appropriate substantiation. Plaintiffs advance the siltation phenomenon as a fact, yet proffer no support. Sec RCFC 56(dXl) ('Each paragraph shall contain citations to the opposing part)'s pleadings or to documentary evidence, such as affidavits or exhibits, filed with the motion or otherwise part of the record in the case.").

[8] Prescault is distinguishable from the instant case because in the former the landowner was subject to both the state and federal regulatory systems, which historically had been intertwined. Given the historical relationship of the regulatory programs, it was appropriate for the court to look to federal law in defining the landowners' property rights. In contrast, the nature of the property interest in this case does not hinge on federal law. The interest is defined solely by state, not federal, law. For purposes of state law, a leasehold interest is generally recognized as a property interest. Lewis Blue Point Oyster, 229 U.S. at 87, 33 S.Ct. at 680; see 767 Third Ave. Assoc. and Sage Realty Corp. v. United States, 48 F.3d 1575, 1578 n. 2 (Fed.Cir. 1995) (individual's right to income under lease constitutes property for purposes of Fifth Amendment) (citing cases).

Alternatively, defendant argues that even though a lease generally gives rise to a property interest--in that it is alienable, descendible, and renewable as of right--plaintiffs *787 hold no compensable property interest because of the nature of the res that is being leased. Relying first on the provisions of the state leases, defendant asserts that plaintiffs hold no compensable expectancy in the continued salinity of the waters above their leased grounds. Defendant correctly contends that the terms of the leases define plaintiffs' property rights under state law. According to defendant, although the state leased certain submerged acreage to individuals, such as plaintiffs who farm oysters, the state guaranteed neither the continued salinity level of the waters above the leased grounds, nor the continued fertility of the leased lands for oyster growth.

Plaintiffs concede that "the leases themselves do not purport to warrant the quality of water over the leases nor guarantee that the leases will not be subject to state and federal efforts to protect natural resources...." Plfs' Br. filed May 2, 1995, at 23 (emphasis added). **[FN 12]** Plaintiffs have not placed into the record copies of any lease agreements which would indicate anything to the contrary. In light of plaintiffs' admission, the court concludes that, based on state law, plaintiffs hold no compensable expectancy in the salinity of the waters above their leased acreage, which rendered their lands fertile.

FN12. The quoted sentence concludes: "[H]owever, the leases need not contain a guarantee that the federal government will pay just compensation to the leaseholder should the lease be destroyed—the Fifth Amendment guarantees plaintiffs this cause of action." Plfs' Br. filed May 2, 1995, at 23. While the court agrees that plaintiffs are not prohibited from pursuing a claim for just compensation under the Fifth Amendment, plaintiffs' admission undercuts their right to compensation, because the admission pertains to whether plaintiffs possess a compensable property interest, a necessary component of a viable takings claim. See supra pp. 784-86.

Notwithstanding plaintiffs' admission, defendant further argues that plaintiffs cannot hold a property right in the artificial, non-historical condition of salinity above their leased grounds. This is so, defendant continues, because the federal levee projects in large part caused the salinity, and the artificial condition consistently had been recognized by local, state, and federal governments as both injuring the oyster industry and as requiring remediation in order to restore habitats favorable to oysters and waterfowl. Thus, according to defendant, plaintiffs have no compensable

property interest in the existence or maintenance of the artificial condition that fostered oyster growth; the condition inhered in the nature of plaintiffs' interest.

According to defendant, plaintiffs, at best, have an unwarranted benefit from a flood control project, not a property right It is well established that a lessor in creating a leasehold cannot convey rights to the lessee which the lessor itself does not possess. In this case the salinity level in the area of plaintiffs' leases, and the corresponding fertility of that acreage, occurred primarily as a result of federal levee projects. **[FN 13]** If the state possessed no vested interest against the Federal Government in the saline condition of the waters, plaintiffs derivatively cannot claim such an interest.

FNI3. See supra note 10.

The issue, a question of first impression, devolves to whether plaintiffs have a vested right, derived from the state, in an unintended benefit resulting from a federal government project, such that cessation of that benefit, due to the consequences of a separate federal project, warrants compensation under the Fifth Amendment. The court holds that the state acquired no vested interest in the salinity of the waters above the leased grounds and that therefore plaintiffs cannot claim such an entitlement. The court does not rule, as defendant argues, that a landowner can never have a compensable property interest in an artificial condition.

Although afforded the opportunity in briefing and during argument to address this issue, plaintiffs proffered no

reply. Plaintiffs' only evidence of a compensable expectancy was that the oyster industry was an important and historic industry in Louisiana. See Transcript of Proceedings, Albert J. Avenal, Jr., et al. v. United States, No. 94-261L, at 31-32 (Fed.Cl. July 18, 1995) ("And with regard to compensable expectancy, I can tell you that Louisiana certainly has depended *788 upon the oyster farmers for the last 30 or 40 years. Louisiana produces over half ... of all the oyster production in the United States....").

4. The unintended effects of a federal government project

Defendant relies on Allain-Lebreton Co. v. Department of Army, 670 F.2d 43 (5th Cir. 1982), to support its argument that plaintiffs cannot claim a property right in an unintended benefit resulting from a federal government project In Allain a company alleged that the Corps' decision not to locate a hurricane protection levee on a certain portion of its lands constituted a taking of its property. The company argued that but for the Corps' veto, the levee district would have approved the proposed easement for the levee. The court held that a decision not to take certain property does not interfere with property rights and that therefore no compensation was due. The refusal to take merely denied the company of a business opportunity and the Federal Government need not pay for such lost opportunities. Allain does not support defendant's theory since the Federal Government took no property in that case. In contrast, the Caernarvon project allegedly interfered with plaintiffs' oyster farming by adversely affecting the salinity level, thereby allegedly effecting a physical taking.

The case law provides some guidelines, but not direct authority. The issue of whether plaintiffs hold a vested right in the unintended benefit of salinity in the area of their leases resulting from the Federal Government's levee projects can be analogized loosely to the issue of whether welfare recipients hold a substantive property right in the entitlements rendered pursuant to government programs. It is well established that recipients of benefits under government entitlement programs do not possess a substantive property right in the continuation of those benefits for purposes of the Fifth Amendment. Sec Bowen v. Gilliard, 483 U.S. 587, 604-05, 107 S.Ct. 3008, 3018-19, 97 L.Ed.2d 485 (1987); Richardson v. Belcher, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-57, 30 L.Ed.2d 231 (1971); Allred v. United States, 33 Fed.Cl. 349, 356 (1995); see also Hoffman v. City of Warwick, 909 F.2d 608, 616 (1st Cir.1990) ("Noncontractual employee benefits that a recipient has not yet received, but has a mere expectation of receiving, are not property as to which the government, before repealing, must provide just compensation...."') (citations omitted); Gattis v. Gravett, 806 F.2d 778, 780 (8th Cir.l986) ('[T]he
legislature which creates a statutory entitlement (or other property interest) is not precluded by having done so from altering or terminating the entitlement by subsequent legislative enactment."); Zucker v. United States, 758 F.2d 637, 640 (Fed.Cir.) ("[A] 'government fostered expectation' that retirees will be provided retirement annuities which will not be ravaged by inflation..., does not rise to the level of 'property protected by the takings clause."'), cert. denied, 474 U.S. 842, 106 S.Ct. 129, 88 L.Ed.2d 105 (1985).

In this case the Federal Government created a

benefit for plaintiffs, albeit an unintended one. Both parties admitted during argument that but for the Federal Government's levee construction, oyster growth in the area of plaintiffs' leases would not have occurred, because the area was too fresh to sustain such growth. In 1965 Congress authorized construction of freshwater diversion structures in the Breton Sound Basin in an effort to rectify the salinity problems resulting from its prior public works projects.

It could be observed that just as recipients of federal government entitlement programs have no vested right in the continuation of the benefits conferred pursuant to those programs, plaintiffs have no vested right in the benefit of continued salinity of the waters above their leased grounds. See Allred, 33 Fed.Cl. at 356 ("[A]ny right of the plaintiffs in the 1HS health care benefits is merely procedural in nature, and does not constitute property for the purposes of the Takings Clause."). The court acknowledges that the analogy to the entitlement programs is not conclusive: In this case although the Federal Government created and withdrew the benefit of salinity, the state independently created the leasehold interests. Moreover, the analogy is not exact in that the issue in this case concerns not only whether plaintiffs ever acquired a compensable interest in the artifcial condition of salinity.

Another line of cases that is loosely analogous deals with the relative benefits doctrine. That doctrine espouses that if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities

in substance take nothing from the landowner....' United States v. Sponenbarger, 308 U.S. 256, 266- 67, 60 S.Ct. 225, 229, 84 L.Ed. 230 (1939) (emphasis added); see Laughlin v. United States, 22 Cl.Ct. 85, 111 (1990), affd, 975 F.2d 869 (Fed.Cir. 1992) (Table). The relative benefits doctrine is inapplicable since it requires both an examination of the relative benefits and detriments of the Government's conduct in relation to a landowners' specific parcel and extensive factual determinations. The parties agree that facts bearing on relative benefits are contested and not ripe for adjudication. In addition, unlike most relative benefits cases, this case involves two discrete federal projects. However, although the doctrine cannot be applied, some of its underlying concepts are instructive. For example, the Court in Sponenbarger, stated:

> An undertaking by the Government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect. In the very nature of things the degree of flood protection to be afforded must vary...

308 U.S. at 265, 60 S.Ct. at 228. Implicit in the Court's pronouncement is that the degree of flooding varies over time. Similarly, the degree of salinity varies over time. Salinity is not a stable characteristic of water', instead, it is subject to the vicissitudes of nature.

With this acknowledgment that the case law is of

marginal assistance, the court turns to the facts surrounding the properties at issue. See United States v. Central Eureka Mining Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958) (holding that decision of whether governmental action constitutes taking for purposes of Fifth Amendment must be based on particular facts of each case); see also Penn Cent., 438 U.S. at 124, 98 S.Ct. at 2659 (ruling that Fifth Amendment takings claims are unique to individual landowner). Specifically, the court focuses on the nature of the federal government-conferred benefit and the Federal Government's recognition of the nature of that benefit for purposes of determining whether the state, and plaintiffs derivatively therefrom, acquired a property interest in the salinity of the waters above plaintiffs' leased grounds.

Defendant characterizes the benefit in this case as being 'akin to ... a nuisance," which the Caernarvon project was designed to abate. Defs Br. filed Feb. 7, 1995, at 35. Although the court is not in a position to find that the salinity problem is a nuisance, defendant correctly contends that the record shows that the increased salinity resulting from the federal levee projects always had been viewed as problematic and detrimental to oyster farming. **[FN14]** Plaintiffs do not dispute this fact. The state even viewed saltwater intrusion as a menacing situation. As of the 1940s, the state, particularly concerned about the massive oyster mortality that had rendered several acres of formerly productive private lease and state seed grounds unusable, initiated various studies to identify solutions to the problem.

FN14. If the increased salinity had constituted a nuisance under state law, the situation could have been remedied by the state gov-

ernment at any time pursuant to state nuisance law. See Lucas,-- U.S. at -- - --, 112 S.Ct. at 2899-901. Because defendant has not sustained its burden on summary judgment of establishing a nuisance as a matter of fact and law, the court places no reliance on the nuisance doctrine.

The Federal Government did not acknowledge affirmatively the adverse, unintended effects of its public works projects until the Fish and Wildlife Service issued the 1959 memorandum. Formal acknowledgment of *790 these effects occurred in 1965, when Congress authorized the construction of freshwater diversion structures in the Breton Sound Basin.

Plaintiffs do not dispute that the areas over their leased lands were too fresh to sustain oyster growth as of 1960. Although it is unclear when those lands became fertile for oyster growth, the 1959 memorandum evidences that as of 1959 the Federal Government had recognized the adverse effects associated with its levee projects and had announced its freshwater diversion program 'to re-establish natural patterns of salinity' in the Breton Sound Basin. In defining the northwest landward end of the Basin, i.e., Area No. 4, as too fresh to sustain oyster growth, the 1959 memorandum stipulates that the diversion projects for that area were designed 'to prevent and push back salt- water intrusion.' Thus, as of 1959,the Federal Government recognized both the aberrant nature of salinity and the need to prevent saltwater intrusion in the upper landward end of the Basin; this recognition occurred prior to the time when the area could sustain oyster growth.

Even assuming that some oyster growth occurred

between 1960 and 1965, when Congress formally adopted the 1959 memorandum and its recommendations, the salinity in the northwest landward end of the Basin, the area of plaintiffs' leases, lasted for, at most, five years. The fact that such area was salinated for a maximum of five years prior to the Federal Government's formal recognition of the adverse consequences associated with its prior levee projects does not enhance the position that the state acquired a vested right in that salinity level. **[FN15]**

FN15. During argument, plaintiffs proffered that the inland movement of salinity occurred gradually over about 90 years. Although plaintiffs are correct, takings jurisprudence dictates that the facts and circumstances surrounding the specific properties at issue be examined. The record reflects that prior to 1960, the areas leased by plaintiffs, as well as those leased by the 800-plus putative plaintiffs, were too fresh to sustain oyster growth.

The court holds that the state acquired no property interest in the salinity level of the waters above plaintiffs' leased grounds. Plaintiffs therefore also hold no compensable expectancy in the salinity. Accordingly, in certain limited circumstances, the Federal Government can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment. Specifically, compensation is not required in this case because the benefit conferred historically had been considered problematic and artificial, and because the Federal Government had recognized the problem and taken steps to ameliorate the situation, at the latest five years, after the occurrence of salinity in the northwest landward end of the Basin.

This result is particularly appropriate given the nature of salinity, which, like silt, is subject to the vicissitudes of nature. The Court of Claims reached a similar result in A-B Cattle Co. v. United States, 223 Ct.Cl. 514,621 F.2d 1099 (1980), wherein a corporate landowner and its stockholders alleged a taking based wholly on the theory that they had a property right to silty water. The court based its holding on the state supreme court's ruling that the landowner had no property right in silty water. Given that pronouncement by the state court, the Court of Claims held: 'The law of eminent domain does not allow compensation for losses of expected benefits from outside the property, not identified as property tights. An example is fish in the sea.... The expectation of traffic on a public street, outside retail premises, is a second example.' A-B Cattle, 223 Ct.Cl. at 524, 621 F.2d at 1104 (citation omitted). Salinity may be construed as a benefit outside the property, like fish in the sea, and therefore compensation is not warranted.

[9] Although the record does not identify the dates on which plaintiffs acquired their leasehold interests, the court rules that, notwithstanding the above analysis, any plaintiff who acquired a lease that included the provision holding the state harmless against any losses sustained as a result of freshwater diversion structures lacks a compensable property interest, because the state lease serves as an inherent limitation on that plaintiffs rights. The record indicates that between 1988 and 1990, the Louisiana Wildlife and Fisheries Commission inserted the hold -*791 harmless clause in all leases. Plaintiffs do not dispute this fact.

[10] The court agrees with plaintiffs that the nature

of the governmental action in this case more closely resembles a physical, as opposed to regulatory, taking, but concludes that further inquiry is unnecessary given that plaintiffs hold no compensable property interest. [FN16] In addition, the court rules that plaintiffs' alleged temporary takings' argument concerning the increased seasonal closures resulting from heightened levels of fecal coliform due to the Caernarvon project fails, given that plaintiffs had no compensable expectancy in the artificial condition which spawned oyster communities in the areas of plaintiffs' leases.

FN 16. The court notes that the factual disputes identified above in the recitation of facts are not material to the disposition of this case, but are included solely to provide background. These disputes all concern issues of notice, such as whether the estimates made by defendant's experts concerning salinity ranges differed from actual estimates obtained following operation of the Caernarvon project. These disputes do not affect the ultimate issue of whether plaintiffs have a compensable property interest.

The issue of notice has caused considerable confusion in the area of takings jurisprudence. The confusion exists primarily between what constitutes a compensable property interest and what constitutes reasonable investment-backed expectations for purposes of the three-pronged inquiry relevant to regulatory takings. See, e.g., 767 Third Ave. Assoc., 48 F3d at 1582 (discussing reasonable investment-backed expectations, but concluding that "[t]he government ... did not take any property interest of Sage. Sage merely had an expectation of future income from rent payments....") (emphasis added). Notice is relevant only for the latter. The former requires an analysis of whether a certain right inheres in one's title to the property.

Defendant exhibits this confusion when it cites Ciampitti v. United States, 22 Cl.Ct. 310, 320-22 (1991), and 767 Third Ave. Assoc., for the proposition that plaintiffs lacked a compensable property interest. These cases discussed only reasonable investment-backed expectations. If the reasonable investment-backed expectations

prong of the three-part regulatory takings analysis were intended to involve the same analysis as the compensable expectancy inquiry, the investment-backed expectations prong would be rendered superfluous. Cf. 767 Third Ave. Assoc., 48 F.3d at 1579-83; Broughton Lumber Co. v. United States, 30 Fed.Cl. 239, 243 (1994); Ciampitti, 22 Cl.Ct. at 320-22.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted. The Clerk of the Court shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

No costs.

END OF DOCUMENT

APPENDIX G

28 USCA s 1738.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

APPENDIX H

USCA CONST Art. IV s 1

Section 1. Full Faith and Credit

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.